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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 466

DIESEL TANKER, A. C. DODGE, INC.,

Petitioner,

against

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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INDEX

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	12

TABLE OF CASES

The Albert Dumois, 177 U.S. 240 (1900)	4
Petition of Diesel Tanker A. C. Dodge, Inc., 133 F. Supp. 510 (E.D.N.Y. 1955), aff'd 234 F. 2d 374 (2d Cir. 1956)	3
Simon v. Maryland Casualty Company, 353 F. 2d 608 (1965)	6, 8, 9, 10

STATUTES

28 U.S.C., Sec. 1254(1)	2
46 U.S.C., Sec. 183	3

Index to Appendix

Opinion of the United States District Court	1(a)
Memorandum Opinion of the United States Court of Appeals	8(a)
Judgment of the United States Court of Appeals	10(a)
Judgment of the Court of Appeals Denying Rehearing	12(a)
Order Denying Petition for Rehearing	13(a)

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No.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DIESEL TANKER, A. C. DODGE, INC., prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the Second Circuit entered May 11, 1967 which affirmed the granting by the United States District Court for the Southern District of New York of a final decree dismising petitioner's libel against respondent K. G. Poland. The suit was brought to recover amounts due from one or more of the four respondents as underwriters at Lloyds and as representatives of other similar underwriters under various policies insuring petitioner against legal liabilities as specified in said policies.

Citations to Opinions Below

The opinion of the United States District Court for the Southern District of New York (R 133-143) * printed in the appendix herein (*infra*, pp. 1a-7a) is reported at 262 F. Supp. 6 (1966) and at 1966 A.M.C. 1746.

The memorandum opinion of the United States Court of Appeals for the Second Circuit (R 27a, 28a) which affirmed on the opinion of the District Court appears in the appendix hereto (*infra*, pp. 8a, 9a) and is reported at 376 F. 2d 896 (1967).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 11, 1967. A timely petition to the Court of Appeals for rehearing was denied by order filed June 1, 1967 (R 38a, *infra*, pp. 12a, 13a).

The jurisdiction of this Court is invoked under 28 USC Sec. 1254 (1).

Question Presented

Under a policy insuring against legal liability for "loss, damage and/or expense to others and/or to the property of others" and "for loss of life and personal injury" may the insurer escape payment to the insured because the amount of the insured's legal liability to a third party, as established in an adversary proceeding, was satisfied by an offset awarded such third party rather than by actual payment of a money judgment against the insured in favor of such other party.

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* References preceded by the letter "R" are to the record.

Statement of the Case

Based upon a stipulation of facts (R 13a) and five exhibits consisting of four insurance policies issued respectively by the respondents and another form of policy referred to in one of respondents' policies, the District Court found and the Court of Appeals adopted the following facts:

On May 25, 1952 petitioner's vessel *A. C. Dodge* collided with the *SS Michael* with resultant loss of life to persons aboard both vessels, personal injuries aboard both craft, loss of cargo on the *Dodge*, damage to the *Michael* and total loss of the *Dodge* (*infra*, 1a). Following the collision petitioner filed a petition for limitation of liability pursuant to 46 USC 183 which, after trial and appeal, resulted in a final decree holding both the *Dodge* and the *Michael* jointly to blame and granting petitioner limitation of liability. *Cf. Petition of Diesel Tanker A. C. Dodge, Inc.*, 133 F. Supp. 510 (E.D.N.Y. 1955), aff'd. 234 F. 2d 374 (2d Cir. 1956). Petitioner was required to deposit in its limitation of liability fund $60.00 per ton of the vessel's gross tonnage for the benefit of personal injury and death claims, pursuant to 46 U.S.C. Sec. 183. From that fund petitioner paid $64,531.50 to one of the death claimants. Before the collision litigation terminated, the *Michael's* owner had paid $610,360 in settlement of death and injury claims and $37,561.75 in settlement of the claim of the owner of cargo on the *Dodge*. The *Michael's* agreed claim for physical damage to that vessel and loss of earnings was $462,618.69. The value of petitioner's vessel *A. C. Dodge* prior to the collision was fixed at $800,000 and other related items of damages brought the petitioner's claim against the *Michael*, exclusive of the amount paid from her limitation of liability fund, to $803,650.57, (Item 5 of stipulation of facts in pre-trial order (R 13a).

In the collision litigation the *Michael* owner was allowed to offset one-half of her physical damage claim plus one-

half of her payments on account of death, personal injury and cargo claims against one-half the damages allowed to petitioner against the *Michael* for loss of the *Dodge* and incidental expenses. (Opinion, *infra,* 6a.) *Cf. The Albert Dumois,* 177 U.S. 240 (1900). If no death, personal injury or cargo damage claims had resulted from the collision petitioner would have been allowed to recover from the *Michael* owner one-half the difference between the respective property damage claims and would have obtained an affirmative recovery of $170,515.94. Instead and solely because of death, personal injury and property damage claims of third parties (for one-half of which the *Dodge* was legally liable to the *Michael* thereby giving the *Michael* owner a right of offset) petitioner recouped nothing from the *Michael* on account of petitioner's property damage claim and thereby lost $170,515.94.

Petitioner had arranged with the various respondents four policies of insurance against its legal liability for death, personal injury and cargo claims. (Opinion, *infra,* 2a.) Those policies were:

A Protection and Indemnity (P&I) policy insured in the amount of $25,000., issued by respondent A. B. Stewart;

An Excess P&I policy insuring in the amount of $175,000. but excess of the first $25,000. of liability, issued by respondent Janson;

A "Legal and/or Contractual Liability" policy issued by respondent Poland insuring in the amount of $750,000.;

An Excess Legal and/or Contractual Liability policy issued by respondent Brookes insuring in the amount of $250,000. excess of $750,000.

The insuring clause of the third (the Poland) policy reads:

> "To cover the legal * * * liability of the Assured for all loss or expense resulting from the legal * * * liability of the Assured and/or their employees

> and/or agents and/or vessels owned, chartered or operated by the Assured for loss, damage and/or expense to others and/or to the property of others of whatever kind whether afloat or ashore and for loss of life and personal injury, death or illness of any person or persons arising out of or resulting from the ownership, use or operation of vessels owned * * *." (Opinion, *infra*, 6a.)

Clause 8 of the same policy excludes claims collectible by the assured under other policies including the Stewart and Janson P&I policies. (Opinion, *infra*, 6a.)

Respondent Stewart having paid the full amount of his policy (the first P&I policy) on account of litigation expense and toward reimbursement of the amount paid by petitioner out of its statutory limitation of liability fund, the suit against him was dismissed by stipulation. (Opinion, *infra*, 3a, note 3.) Since the amount of petitioner's claim does not reach the excess limits of the fourth policy issued by respondent Brookes, the suit was likewise dismissed by stipulation as to that respondent. (Opinion, *infra*, 3a.) Thus the parties before the Court at time of this trial were respondent Janson who had issued the Excess P&I policy and respondent Poland who had subscribed to the primary Legal and/or Contractual Liability policy.

The District Court held and the Court of Appeals affirmed that the P&I policy issued by Janson was, in respect of this loss, one of strict indemnity and that since petitioner had not actually paid out of its pocket the amount here claimed, the P&I policy did not cover the loss and dismissed the suit against him. Petitioner does not seek review of that part of the decision.

The Court also dismissed the libel against Poland who subscribed to the Legal and/or Contractual Liability policy. Although the Court recognized that petitioner had suf-

fered a loss because the *Michael* had been allowed to offset against petitioner's recovery the amount the *Michael* had paid in settlement of death and personal injury claims, it held that petitioner "did not incur the requisite legal liability as a result thereof". The Court also stated that the Poland policy covers only "the assured's liability for loss *to others* or the property of others." (Opinion, *infra*, 7a.) The District Court evidently did not consider that the *Michael* owner fell within the category of "others" and did not consider that the *Michael* owner's payment to third parties was a "loss" to the *Michael* owner of the type referred to by the words "liability for loss to others."

Reasons for Granting the Writ

The question of law involved is of great importance to business of all types and indeed, to a tremendous number of private individuals in the United States. It is not necessary to dwell upon the prevalence of legal liability insurance in this country among home owners, automobile owners, small pleasure boat owners and sportsmen of all types as well as almost every commercial enterprise. While the involved policy covers marine liabilities, its language, in all important respects, is similar to that which will be found in innumerable liability policies not related to the shipping world.

The decision sought to be reviewed is in direct conflict with the decision of the United States Court of Appeals for the 5th Circuit in *Simon* v. *Maryland Casualty Company*, 353 F. 2d 608 (1965). In that case plaintiff Simon was a subcontractor under a Government contract and had caused fire damage to a Government building. Maryland had issued Simon a policy insuring against legal liability for negligent damage to property. The Government withheld from Simon's prime contractor a sum representing damages to

Government property caused by Simon's negligence and the prime contractor in turn withheld from Simon an amount of money otherwise admittedly due Simon for work under the subcontract. In the suit by the contractor against the Government for recovery of the amount withheld by the latter, in which Simon participated, the Court found that the fire damage was due to Simon's negligence and upheld the right of the Government to withhold from the prime contractor and of the latter to withhold from Simon, payments otherwise due under the contract and subcontract. The defendant insurer refused to pay to Simon, under its liability policy, the amount withheld by the prime contractor on the ground that the insured had not been held legally liable to pay damages. In the course of its opinion holding Maryland Casualty Company obligated to pay Simon, the Court of Appeals for the 5th Circuit stated in a unanimous decision (at p. 611)

> "Several things stand out sharply. First, the Assured-subcontractor has suffered the irretrievable, permanent loss of $7,886.83 plus its share of legal costs. Second, this loss was the direct result of operational negligence of its employees. And third, and perhaps more decisive, a full-fledged court having jurisdiction over the subject matter and the parties in a genuine no-holds-barred-adversary proceeding necessarily determined that the conduct of the Assured-subcontractor was negligent. In a word, the Insurer got every protection it would have obtained had the suit been United States v. Simon or Douglass Bros., Inc. v. Simon. The question is, therefore, whether by any reasonable construction of the policy, it ought to bear the same liabilities."

And at page 612:

> "A suit is against an assured when, in a judicial proceeding to which he is a party (or deemed by the law to be a party), a definable claim or con-

> tention is asserted that the assured has a legal liability for damage or injury to person or property. Similarly, it is a judgment against an assured where, in such a situation, the tribunal renders an enforceable decree adjudging that the assured has a legal obligation to pay, reimburse or bear, the loss sustained by the third party. Thus, for example, a claim by way of offset, not an affirmative counterclaim, F. R. Civ. P. 13, or *striking the balance in a maritime half-damage situation,* see e.g. Gilmore & Black, Admiralty §§ 3-39, 7-4, 7-6 (1957); The Ella Warley-North Star, 1882, 106 U.S. 17, 22-23, 1 S. Ct. 41, 46, 27 L. Ed. 91, 93-94, *obviously would be covered.*" (Italics supplied.)

Since the *Simon* decision so closely parallels this case, we deem another quotation from it appropriate (p. 614):

> "The upshot of it is that for a case and a claim admittedly within the coverage of the policy, meeting both the needs of the Assured and full protection of the Insurer, the Insurer bears no liability because the form of litigation was unorthodox. The language of neither the Defense Coverage Clause nor the No-Action Clause was ever intended to bring about such an artificial windfall."

In the instant case petitioner, after trial and appeal, was held legally liable for a collision which resulted in claims for loss of life, personal injury and cargo damage. Because of the intricacies of Admiralty law the petitioner did not pay money directly to the majority of the third parties who were making claim for such deaths, personal injuries and cargo damage claims. If it had done so, unquestionably it could have recouped from its various insurers. Nevertheless, although petitioner did not make payments out of its pocket, it did suffer a loss. That loss was suffered because the *Michael* could and did use the

amounts she had paid on those third party claims to cancel her obligation to petitioner. Therefore, the offset granted the *Michael* under Admiralty law amounted to a payment by petitioner to the *Michael* owner of sums of money on account of liabilities of petitioner for deaths and injuries to others.

There is no material difference, we submit, between the state of facts in this case and the state of facts involved in the 5th Circuit case of *Simon* v. *Maryland Casualty Company* (*supra*).

The insuring clause involved in *Simon* v. *Maryland Casualty Company* (*supra*) reads: (Cf. footnote 8 of decision)

> "I Coverage B—Property Damage Liability
>
> To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident."

The insuring clause of the Poland policy issued to this petitioner reads:

> "To cover the legal and/or contractual liability of the Assured for *all loss* or expense resulting from the legal and/or contractual liability of the Assured and/or their employees and/or agents and/or vessels owned, chartered or operated by the Assured *for loss, damage and/or expense to others* and/or *to the property of others* of whatever kind whether afloat or ashore *and for loss of life and personal injury, death or illness of any person or persons* arising out of or resulting from the ownership, use or operation of vessels owned, or as a result of acting as Agents, chartered or operated by the Assured or arising out of or resulting from the piloting or other

handling of Vessels (with or without their own power) of others by the Assured or others for whom they may be responsible or arising out of or resulting from the acts or omissions of pilots or others for whose acts or omissions the Assured may become liable." (Italics supplied.)

The facts and the language of the insuring clauses in this case and in *Simon* v. *Maryland Casualty Company* (*supra*) are so closely alike that conflict between the two decisions is readily apparent. We submit that the decision here sought to be reviewed is erroneous in law and that the reasoning in *Simon* (*supra*) is in keeping with the modern trend.

Respondent may argue as it did below that petitioner is not seeking to recover a loss it sustained because it had been held legally liable to the *Michael* for one-half the third party death and injury claims but is seeking to recover a loss it sustained by reason of the destruction of its own property in the collision with the *Michael*. That reasoning, we submit, is erroneous. While it is true that the money petitioner sought to collect from the *Michael* represented partial payment for the loss of petitioner's property, it is equally true that the money plaintiff in *Simon* (*supra*) would have received was payment for work, labor and services. In each case the payment was denied because of an existing legal liability to the party who otherwise would have been obligated to make such payment. The question to be asked and answered is not what the denied payment represented but rather what was the ground on which or the reason why the payment was denied. In this case and in *Simon* (*supra*) the payments were denied because of a legal liability for damage to property and/or injury to persons against which liability the parties had paid premiums to insure.

In the Courts below the respondents argued that petitioner could have avoided this loss if it had arranged hull

insurance on its vessel for the full amount of her market value thus transferring this loss to hull underwriters but the fact is that petitioner, as it was free to do, insured the hull for an amount agreeable and aceptable to its hull underwriters which was substantially less than her market value. These legal liability underwriters have no concern with the hull insurance arrangements which petitioner and the hull underwriters saw fit to make. Because of the limited hull insurance which petitioner arranged, the loss here suffered by petitioner is entirely for its account and not for the account of any other insurer. Petitioner suffered that loss because of its liability for death, personal injury and cargo claims against which liability it paid these respondents to insure. The concerned respondents should not receive a windfall merely because the *Michael* saw fit to settle the third party claims in the first instance and offset them against the petitioner. If the *Michael* had not settled those claims and permitted the various third parties to continue in the litigation petitioner would have effected a recovery from the *Michael* for the loss of its vessel which recovery would have become part of petitioner's limitation of liability fund and would have been paid pro rata to those third party claimants. We submit the route by which the liability fell upon petitioner is unimportant. Important only is the fact that petitioner suffered a loss by reason of its legal liability for these claims and against which liability these respondents accepted premiums to insure.

We submit that the conflict in the decisions of the Second and Fifth Circuits concerning the rights of an assured under "legal liability" insurance in the circumstance described should be resolved and that this decision should be reviewed.

Conclusion

It is respectfully submitted that the foregoing considerations warrant allowance of the writ sought by petitioner.

Dated: New York, New York
August 7, 1967

Respectfully submitted,

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FOLEY & MARTIN,
STEPHEN J. BUCKLEY,
of Counsel.

APPENDIX

Opinion (133-143)

UNITED STATES DISTRICT COURT

Southern District of New York

[Same Title]

Cannella, *J.*:

The libel seeking recovery under the insurance policies involved in this case, is dismissed.

Since the action is founded on marine insurance, the court finds that it is within the admiralty jurisdiction of this court. 28 U.S.C. § 1333.

This case was tried before this court, without a jury in January, 1966. Suit was brought against the respondents as underwriters and as representatives of other subscribers to policies of insurance issued by Lloyds, London, insuring the libellants[1] against loss by reason of liabilities arising from certain cases enumerated in the policies.

On May 25, 1952 the Diesel Tanker A. C. Dodge collided with the S.S. Michael (and thereafter fire occurred) with resultant loss of life to persons aboard both vessels, personal injuries aboard both craft, loss of cargo on the Dodge, damage to the Michael and total loss to the Dodge.

Following the collision libellant Dodge filed a petition for limitation of liability and after trial and appeal it was held that the collision resulted from the joint fault of the Dodge and the Michael. It was also held that libellant Dodge was entitled to a limitation of liability. Petition of Diesel Tanker A. C. Dodge, Inc., 133 F. Supp. 510 (E.D. N.Y. 1955), aff'd, 234 F.2d 374 (2d Cir. 1956). The Dodge was required to deposit in its limitation of liability fund $60.00 per ton of the vessel's gross tonnage for the benefit

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[1] Alma R. Bushey and Raymond J. Bushey, Jr., as Executors of the Estate of Raymond J. Bushey, deceased, disclaimed any interest in any amount recovered by libellant Dodge from any of the respondents and consented to the payment thereof to said libellant.

of personal injury and death claims, pursuant to 46 U.S.C. § 183. Out of this fund the libellant paid $64,531.50 to Frances Elliott, Administratrix of the Estate of John Elliott, Master of the Dodge, who died in the collision.

Before the above-mentioned litigation terminated, the owner of the Michael had settled the majority of the personal injury and death claims and the claim of the owner of the cargo on the Dodge. The Michael owner also paid to Frances Elliott the sum of $59,000.00 for a covenant not to sue the Michael.

The Dodge owner was insured under the policies of Hull and Disbursements Insurance in the amount of $400,000.00 which policies contained an American Hull Syndicate standard form of Running Down clause. Those insurers paid libellant the full face amount of the policy on the loss of the Dodge. The Dodge was also insured against fire in the amount of $150,000.00, in excess of the Hull Insurance coverage. The underwriters of that policy paid libellant $75,000.00 on account of the total loss of the Dodge.

There were four additional policies of insurance[2] in full

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[2] (a) Policy No. 614 B 440943, issued by respondent, A. B. Stewart and others, referred to as a Protection and Indemnity Policy (otherwise known as P & I) insuring in the amount of $25,000.00 subject to a deductibility average of $500.00.

(b) Policy No. 614 B 440944, issued by respondent Guy Janson, and others, referred to as excess Protection and Indemnity, in the amount of $175,000.00, excess of the first $25,000.00 of ultimate net loss.

(c) Policy No. 614 B 446491, issued by respondent, K. G. Poland, and others referred to as a legal and/or contractual liability policy, insuring libellant in the amount of $750,000.00.

(d) Policy No. 446492, issued by respondent, G. B. Brookes, and others, referred to as an excess legal and/or contractual liability policy, insuring libellant in the amount of $250,000.00, but only to pay the excess of $750,000.00 for losses covered by policy "(c)" hereinabove.

force and effect at the time of the collision.[3] The respondents freely admit the existence of such policies.

All the policies are in writing. The breach claimed by the libellant is the failure of the respondents to pay the amount of the loss which libellant claims was sustained. The respondents assert that the loss which the libellants claim to have sustained is not payable under the terms and conditions of any of the policies which are involved in this case.

The clauses of the policies upon which the libellant relies are alleged in the libel and the respondents do not contest the correctness of such clauses.

It is well settled that in a "both to blame" collision, if one of the colliding vessels pay third-party claims, such claims become part of the collision damage of the vessel paying the claim. See The Albert Dumois, 177 U. S. 240 (1900), N. Y. & Cuba S/S Co. v. American S.S. Owners Mutual Protection and Indemnity Assn. Inc., 72 F.2d 694 (2d Cir.), cert. denied 293 U. S. 622 (1934). Under the maritime law of collision, the Michael was able to offset one-half of her payments on account of these claims against one-half of the damages allowed to the Dodge for loss of the Dodge and incidental expenses.

It is the libellant's contention that were it not for such third party death, personal injury and cargo damage claims, the libellant would have recovered from the Michael $170,515.94. This figure is arrived at by using a general rule in a "both to blame" collision, viz., the vessel that is damaged least pays the other vessel an amount equal to one-

[3] By stipulation at the trial the libel was dismissed as against respondent underwriters subscribing the Stewart Primary P & I Policy 614 No. 440943 and against underwriters subscribing the Brookes Excess Legal and/or Contractual Liability Policy No. 446492 without costs; since the Stewart policy was paid in full and since the amount of the alleged loss did not exceed the Poland policy.

half the difference of the sum of the losses sustained. See The North Star, 106 U. S. 17, 20 (1882); Petition of the Diesel Tanker A. C. Dodge, Inc., supra. The sum of $170,515.94 is one-half the difference between the hull claim of the Michael, $462,618.69, and the total loss value of the Dodge, $800,000.00, plus stand-by wreck and salvage expenses, a total of $803,650.57.

It is libellant's contention that the alleged loss that he suffered is covered under the insurance policies involved herein. Insofar as the Protection and Indemnity (P & I) policies are concerned, the libellant asserts that the loss falls within clauses 4 and 4(a) of the Stewart policy, which is incorporated by reference into the Janson excess policy.

The P & I policies, as stated in the general provisions of such policies, undertake to insure the assured only for what he has become liable to pay and has actually paid, i.e., strict indemnity. However, clause 4(a) provides that if a claim arises under clause 4, it should be settled on the principle of cross-liabilities. The cross-liabilities principle states, in effect, that adjustment for losses in a "both to blame" collision should be made as if the owners of each vessel had been compelled to pay the owner of the other vessel some portion of the latter's damages that may properly be allowed in ascertaining the sum payable to the assured because of the collision. In other words, if cross-liabilities is applied, an insured owner will be deemed to have paid a portion of the damages even though, in fact, he has not actually expended any of his own money.

It is the libellant's position that even though he has been fully reimbursed for out-of-pocket costs or expenses, since he is demanding recovery for a loss under clause 4, strict liability does not apply; but rather, by applying cross-liabilities he could recover for the alleged loss.

It is well settled that if there is any ambiguity in a policy it should be resolved in favor of the assured. Trinidad Corp. v. American S/S Owners Mutual Protec-

tion & Indemnity Ass'n, 229 F.2d 57 (2d Cir. 1956). However, this court finds no ambiguity at all in clauses 4 and 4(a). Although 4(a) provides for the use of cross-liabilities, it is clear that it can be used to the same extent only as provided in the American Marine Insurance Syndicate Running Down Clause. This is explicitly set forth in clause 4(a).

Therefore, the use of the cross-liabilities principle would be governed by whatever limitations and conditions are established in the running down clause. The running down clause provides for the settling of claims, in a "both to blame" collision, on the principle of cross-liabilities *unless* the liability of the owners or charterers of one or both of the vessels is limited by law. Since the liability of the owner of the Dodge has been limited, it follows that the cross-liabilities *theory* principle mentioned in clause 4(a) of the P & I policy could not be used even if the libellant had incurred a liability for loss under clause 4.[4] Therefore, the libellant could only recover under the P & I policies on the principle of strict indemnity and since libellant has already been reimbursed for what it has actually paid out, it is entitled to no further recovery under the P & I policies.

In N. Y. & Cuba S/S Co. v. American S.S. Owners Mutual Protection and Indemnity Assn. Inc., supra, the court was faced with facts substantially similar to those present in this case. A shipowner made a claim against his P & I insurer for a third party loss offset by the other shipowners in a "both to blame" collision. The P & I

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[4] Even apart from the contract involved in this case, it seems to be the general opinion of text writers that in a case where the liability of one or both owners has been limited by law, the cross-liabilities principle cannot be used as a basis of settlement in a "both to blame" collision, since it would not be practical. See Hurd, The Law and Practice of Marine Insurance 123 (2d ed. 1952); Templeman on Marine Insurance 309 (1950).

policy contained a clause worded similar to clause 4 of the Stewart policy. The court denied recovery under the P & I policy. The N. Y. & Cuba S/S Co. case is distinguishable from the instant case. The policy in that case made no provision for the application of cross-liabilities and therefore, of course, contained no limitation on the extent to which cross-liabilities could be used to settle claims. Although the court recognizes the importance of the N. Y. & Cuba S/S Co. case, it is not dispositive of issue in this case, insofar as the P & I policies are concerned.

If no recovery can be made under the P & I policies, it is libellant's position that full recovery could be made under the Poland policy. This policy does not provide for strict indemnity and therefore no question would arise as to whether the policy required the application of the cross-liabilities principle. All that the Poland policy requires, as set forth in clause 3 of that policy, is that the assured incur a legal liability. Clause 3 provides that it is: "To cover the legal . . . liability of the Assured for all loss or expense resulting from the legal . . . liability of the Assured and/or their empoyees and/or agents and/or vessels owned, chartered or operated by the Assured for loss, damage and/or expense to others and/or to the property of others of whatever kind whether afloat or ashore and for loss of life and personal injury, death or illness of any person or persons arising out of or resulting from the ownership, use or operation of vessels owned, . . ."

Clause 8 of the same policy provides that recovery can be made under it only if such losses are not collectible under Hull and Machinery or P & I policies. Since the libellant's alleged losses could be collected neither under the Hull policy, from which the libellant has received the full face amount, nor under the P & I policies for the reasons mentioned above, the libellant can recover, if at all, only under the Poland policy which is referred to by the libellant as the "umbrella" policy.

While it may be true that the libellant suffered a loss as a result of the setoff against it by the Michael, this court finds that the libellant did not incur the requisite legal liability as a result thereof. As stated in the N. Y. & Cuba S.S. Co. case,[5] supra, at 697: "This diminuition [loss] was not due, however, to any liability of the Mexico to its own cargo or to the Hamilton, but simply because the Hamilton might offset its own damage in the division and such damage included its liability to the Mexico's cargo." Similarly in this case, the diminuition of the Dodge's claim was not due to any legal liability for personal injury, death and cargo damage. The libellant has already been reimbursed for any legal liabilities incurred as a result of the collision.

In any event, the Poland policy only covers the assured's liability for loss *to others* or the property of others. It does not cover any loss sustained by the assured by reason of the loss of its own property. The claim for $170,515.94 was, in effect, asserted to recover at least a part of the value (over and above that already received from various policies) of the Dodge which was a total loss.

It is this court's finding that the libellant is not entitled to recover either under the Janson or Poland policies or a combination of both. Therefore, the libel is dismissed.

So ordered.

Dated: New York, N. Y.,
March 23, 1966.

/s/ JOHN M. CANNELLA,
U. S. D. J.

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[5] Although this case was distinguished, when dealing with the P & I policies, it is of particular relevance to the present discussion.

Memorandum Opinion of the Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 450—September Term, 1966

(Argued May 4, 1967 Decided May 11, 1967.)

Docket No. 31169

DIESEL TANKER, A. C. DODGE INC., and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Appellants,

v.

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Appellees.

Before:

WATERMAN, FRIENDLY and FEINBERG,
Circuit Judges.

Libelants-appellants, who sought recoveries upon certain marine insurance policies, appeal from final decree below, United States District Court for the Southern District of New York, Cannella, *J.*, dismising their libel against all respondents-appellees. Affirmed.

Memorandum Opinion of the Court of Appeals for the Second Circuit

CHRISTOPHER E. HECKMAN, FOLEY & MARTIN, JOHN H. HANRAHAN, New York City, for Appellants.

WILBUR H. HECHT, MENDES & MOUNT, BRENDAN J. CONNOLLY, New York City, for Appellees.

PER CURIAM:

The final decree entered below dismissing the action is affirmed on the opinion of Judge Cannella, reported at 262 F. Supp. 6 (1966).

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of May, one thousand nine hundred and sixty-seven.

Present:

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Hon. WILFRED FEINBERG,
Circuit Judges.

DIESEL TANKER A. C. DODGE, INC. and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Libelants-Appellants,

v.

A. B. STEWARD, GUY JANSON, K. G. POLAND and G. B. BOOKER, each individually and as representative of various underwriting groups at Lloyd's London,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

Judgment of Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed with costs to the appellees.

A. Daniel Fusaro,
Clerk.

Judgment Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of June, one thousand nine hundred and sixty-seven.

Present:

Hon. STERRY R. WATERMAN,
Hon. HENRY J. FRIENDLY,
Hon. WILFRED FEINBERG,
Circuit Judges.

DIESEL TANKER A. C. DODGE, INC. and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Libelants-Appellants,

v.

A. B. STEWARD, GUY JANSON, K. G. POLAND and G. B. BOOKER, each individually and as representative of various underwriting groups at Lloyd's London,

Respondents-Appellees.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DIESEL TANKER, A. C. DODGE INC. and ALMA R. BUSHEY and RAYMOND J. BUSHEY, JR., Executors of the Estate of RAYMOND J. BUSHEY, Deceased,

Appellants,

v.

A. B. STEWART, GUY JANSON, K. G. POLAND and G. B. BROOKES, etc.,

Appellees.

Petition for Rehearing

FOLEY & MARTIN, New York, N. Y., for appellants.

Petition denied.

S. R. W.
H. J. F.
W. F.
U. S. C. JJ.

1 June 1967